(1) THIS IS AN OPEN BOOK EXAMINATION. Candidates may use notes, books, or any other written material they have brought into the examination room. Communication devices such as mobile phones are not permitted. Candidates are asked to ensure that their phones are turned off.

(2) THE READING TIME MAY NOT BE USED TO WRITE THE EXAM. You may use this time to take notes on scrap paper or in your exam paper. You are advised to use this time to read through the exam and think about your answers.

(3) Full citation of cases is not necessary. You may refer to cases in short form (e.g.: “Scalera”).

(4) This examination is designed to test material covered in this course only. Do not concern yourself with sources not covered in the course materials, class discussions, or lectures.

(5) Questions raise issues that do not have one “right” answer. Identify and discuss fully the points raised by each question, giving some sense of the relative strength of the arguments.

(6) State clearly any facts you assume in answering the questions. If you need to rely on additional facts that are not in the exam, state so.

(7) A suggested working time for each question is indicated on the exam paper. Be careful to budget your time.

THIS EXAM CONSISTS OF THREE PARTS. YOU MUST ANSWER THE PROBLEM QUESTION IN PARTS ONE AND TWO. ANSWER ONLY ONE QUESTION OF YOUR CHOOSING IN PART THREE.
PART ONE: 35 marks (recommended time: 1 hour 5 minutes)

You are a lawyer working in British Columbia. Your client, Robert Brown, seeks your advice. Mr. Brown is 52 years old, and is a certified accountant. He is married to Barbara Brown. They have two young children.

Mr. Brown worked in the forest industry since 1989 holding various accounting positions. In 2002, he took a job as a divisional accountant with Bruno Lumber, a large company located in Kamloops.

In March 2006, Mr. Brown was contacted by Glen Stevens, a representative of Canadian Forest Products Ltd. (Canfor) in Prince George. Mr. Stevens and Mr. Brown were old friends. Because of their friendship, Mr. Stevens knew that Mr. Brown and his wife had always wanted to move to Prince George to raise their family.

Mr. Stevens asked Mr. Brown if he would be interested in taking a job as regional accounting manager at Canfor in Prince George. As regional accounting manager, he would be responsible for the accounting functions at three mills. This would be a step up from his current position. Mr. Brown was interested in the job, especially as he and his wife had always wanted to live in Prince George. Because they had a young family, and because his wife held a lucrative position at the time, both he and his wife had to be persuaded.

During the time period in question, the forestry industry in British Columbia was experiencing significant problems relating to a serious economic downturn. This made Mr. Brown more hesitant to leave his current position.

Wanting to persuade Mr. Brown to take the position at Canfor, Mr. Stevens invited the Brown family to Prince George for a weekend. On March 16, 2006, Mr. Brown met with Mr. Stevens to discuss details and persuade Mr. Brown to take the job.

Mr. Brown tells you that at the March 16 meeting, he asked Mr. Stevens many questions. He saw no point in moving to Prince George if the job was not secure and long-term. Mr. Brown asserts that Mr. Stevens made affirmative representations that the Canfor job was secure. He further states that Mr. Stevens said Canfor had substantial cash holdings, showed him documentation to this effect, and said that he expected these cash holdings would “get them through” the difficult economic times. Mr. Brown recalls that when asked questions about the economic downturn, Mr. Stevens said, "when times are tough we need more accountants!”. He recalls leaving the meeting with a “very rosy picture of only positives”, convinced that the job would be secure.

Mr. Stevens remembers the March 16 meeting differently. He recalls telling Mr. Brown about the healthy cash position of the company, showing him documentation to this effect, and stating that he believed Canfor would survive the current downturn. He also recalls telling Mr. Brown that the company was in position for growth opportunities, and that in difficult times there was a need for
strong accounting professionals. Mr. Stevens says he was as honest and transparent as he could be about Canfor’s economic position.

However, Mr. Stevens does not recall any discussion about job security. He also says that as a matter of common sense, Mr. Brown should have known that given the economic climate, no job in the forestry industry was 100% secure. He also says that he would never have offered the Canfor job to Mr. Brown if he did not think it was secure, particularly given their friendship. In Mr. Stevens’ opinion, Mr. Brown “turned a blind eye to the economic realities”, as he was more concerned with his family’s desire to move to Prince George than with the details of the position.

Mr. Brown accepted the Canfor position in March, and began working there in April. He and his wife sold their home in Kamloops and purchased a new home in Prince George.

Shortly after he starting working at Canfor, Mr. Brown became aware that Canfor was losing money. He raised this concern with Mr. Stevens, but was told he “should not worry” since Canfor was “still doing fine”.

On June 1, 2006, Canfor hired a new Chief Operating Officer (CEO) named Ms. Sylvia White. Soon after her appointment, Ms. White introduced and implemented a plan to “get Canfor back on its feet”. By August 1, 2006, she announced a 25% reduction in payroll costs, and called for the elimination of 20 positions, including Mr. Brown’s position. Mr. Brown was instead offered the job of divisional accountant, which paid significantly less than the regional manager position.

Mr. Stevens maintains that while he knew Canfor was searching for a new CEO to “get Canfor back on its feet”, he was not aware of any plans to eliminate any positions and cut down salaries so radically. He tells you that because Ms. White ranks higher than him on the company ladder, he had no input into her decision-making process.

Mr. Brown maintains that Mr. Stevens ought to have known that the radical restructuring was a possibility during the March 16 meeting, and should have advised him of this fact. Mr. Brown believes he was induced to leave his job at Bruno Lumber as a result of Mr. Stevens’ inaccurate and misleading representations, and wants to sue both Canfor and Mr. Stevens in negligent misrepresentation.

Mr. Brown wants to sue Ms. Stevens in negligence. Can a duty of care be established?

For the purposes of this question, assume that this action is not barred by any Limitation Act.
PART TWO: 35 marks (recommended time: 1 hour 5 minutes)

You are a judge of the British Columbia Supreme Court. The following case comes before you.

The plaintiffs Mr. and Mrs. Kirk claim damages for brain injuries suffered by their son, Benjamin Kirk. Benjamin suffered an injury in 2015 while in the care of the defendant, Nancy Boyd. Ms. Boyd was the owner and operator of Kare Bear Child Care, a licensed daycare in British Columbia (the "Daycare"). Benjamin was three years old at the time.

On the day in question, Benjamin was playing while seated on a chair in the Daycare, made a sudden motion, slipped, fell, and struck his head. The plaintiffs claim that Ms. Boyd failed to properly supervise Benjamin, and should be held liable for his injuries.

Provincial guidelines prescribe certain criteria for daycare facilities in British Columbia. Specifically, they prescribe that for every eight children in care, there must be two adults present. The guidelines also prescribe that no more than three children can be under the age of one at any given time. At the time of Benjamin's accident, there were nine children in the Daycare, with two adult supervisors (Ms. Boyd and another colleague). Two of the children were under the age of one.

Ms. Boyd concedes that she owes the plaintiffs a duty of care but maintains she was not negligent in her conduct. She states that she was attentive to Benjamin at the time of the accident. She testifies that on the day in question, the children were split into two groups. She was indoors with Benjamin and four other children, while her colleague was outdoors with the remaining kids. Minutes before Benjamin slipped, Ms. Boyd smelled that the muffins she was baking for the kids were burning. She recalled that she had failed to replace the batteries in the smoke detector, and, worried for the well being of the children, rushed to turn the oven off. Immediately after, she saw Benjamin trip out of the corner of her eye. She rushed to Benjamin a few seconds later but could not reach him in time to prevent his fall.

Ms. Boyd opened the Daycare in 2007. At first, she was not aware that the province required her to obtain an operating license through Capital Health Region ("CHR"). When a client advised her of this requirement, she submitted an application to CHR, summary of qualifications, three references, proof of first-aid training, and approval from the local fire marshal. Following a detailed inspection, CHR approved and licensed the Daycare.

CHR inspected the Daycare on an annual basis. The results were routinely good. CHR was pleased with Ms. Boyd's care, and the facilities were clean and well kept. The kids were thriving and the parents seemed to be happy with the level of care provided.

Between 2007 and 2015, CHR received the following complaints about Ms. Boyd:

In June 2008, a parent complained that Ms. Boyd had four children under the age of one in her care. In response, Ms. Boyd said she had received a special request to care for two siblings at once, and, since the youngest child was aged eleven months, she decided to "bend the rules just this once" and
accept him into the daycare. CHR conducted an investigation, but determined that this contravention was technical and not egregious. Since the children seemed happy and well taken care of, CHR did not escalate the matter further.

In September 2008, another parent complained that one of the children in Ms. Boyd’s care fractured her arm while in the Daycare. CHR conducted a detailed inspection and noted no health or safety concerns. There were no indications of any wrongdoing on the part of Ms. Boyd. Since the parents of the injured child had no concerns about the care provided by Ms. Boyd, and continued to use the Daycare for their child, CHR decided not to escalate the matter.

In June 2009, CHR received a complaint from another parent regarding napping issues, feeding issues, and diaper-changing concerns. CHR conducted an inspection and was not able to substantiate any of the parent’s concerns, and decided not to escalate the matter.

In February 2010, CHR received a complaint from another parent suggesting Ms. Boyd’s house was dirty, and that there were too many young children in her care. CHR conducted an inspection and could not substantiate any of the complainant’s concerns. The number and ages of the children in care were as required, and the home complied with all cleanliness and hygiene requirements.

At trial, the plaintiffs tendered evidence from Dr. Ritchey, a child psychologist with 25 years applied experience. Dr. Ritchey testified that after receiving four complaints against Ms. Boyd, CHR should have conducted more detailed investigations. In his opinion, while Ms. Boyd was clearly caring and attentive, the complaints against her showed that she was overwhelmed and scattered, and was not suited to operate a daycare.

The defendant tendered expert evidence from Dr. Knowles, a Professor of Child Development at the University of British Columbia, with over 30 years experience. Dr. Knowles testified that Ms. Boyd was a competent, caring, and dedicated child-care provider. Dr. Knowles was of the opinion that the complains filed against her were without basis. Dr. Knowles testified that many parents tend to be over-protective of their children, and file exaggerated complaints that have little to do with the quality of care provided. In Dr. Knowles opinion, CHR was operating diligently and responsibly in authorizing Ms. Boyd’s Daycare. Dr. Knowles also testified that while Benjamin’s accident was devastating, Ms. Boyd should not be blamed for the injury. In her words: “as sympathetic as I am to Benjamin’s terrible injuries, accidents happen. Kids will be kids”.

CHR is regulated by the Community Care Facility Act, R.S.B.C. 1996, c. 60. The Act imposes upon CHR and all of its employees broad statutory duties to promote the health, safety, and well-being of children in the province. Specifically, section 8 of the Act requires all CHR employees to only approve and employ persons of good character who operate their care facility in a manner that maintains the dignity and individuality of the children being cared for, and promotes the health and safety of the children in care and the public at large.

Can Ms. Boyd be held liable in negligence for Benjamin’s injuries? Recall that Ms. Boyd concedes the she owes the plaintiffs a duty of care.
PART THREE: 30 marks (recommended time: 50 minutes)

Answer ONLY ONE of the following questions:

(1) Indigenous laws and the experience of Indigenous peoples in Canada have been strongly affected by the practice of tort law. How, in the future, could the experiences of Indigenous peoples affect or inform the development of the law of torts? Explain your answer by discussing cases or themes examined in both first and second term.

(2) Should punishment — rather than compensation and deterrence — be the primary goal of Canadian tort law? What would the implications be of moving away from tort law’s current commitment to corrective justice? Explain your answer by discussing cases or themes examined in both first and second term.

END OF EXAMINATION.